

GTE Sylvania: The Case for Overruling Albrecht v. Herald Co.

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I. INTRODUCTION

The recent United States Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*¹ casts considerable doubt on the continuing validity of *Albrecht v. Herald Co.*² In *GTE Sylvania* the Supreme Court overruled *United States v. Arnold, Schwinn & Co.*,³ which had held that a manufacturer's imposition of nonprice restrictions on its independent distributors was per se illegal. One year after the Court announced the *Schwinn* per se rule on nonprice vertical restraints, the Court announced the *Albrecht* per se rule against manufacturer's restrictions on the maximum resale price charged by independent distributors.⁴

Perhaps reflecting the changed composition of the Court,⁵ *GTE Sylvania* signifies a retreat from the Court's frequent finding of per se illegality in decisions of the previous decade, and a step toward greater emphasis on the economic effects of the questioned conduct. As stated by Justice Powell in *GTE Sylvania*, the "rule of reason,"⁶ a determination of

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1. 433 U.S. 36 (1977).

2. 390 U.S. 145 (1968).

3. 388 U.S. 365 (1967). For an exhaustive list of articles criticizing the *Schwinn* decision, see *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 n.13 (1977). See generally ABA ANTITRUST SECTION, MONOGRAPH NO. 2, *Vertical Restrictions Limiting Intra-brand Competition* (1977) [hereinafter cited as MONOGRAPH].

4. Vertical maximum resale price restraints must be distinguished from minimum resale price restraints or what has commonly been referred to as resale price maintenance agreements. This Article equates vertical minimum resale price restraints with the concept of resale price maintenance. Although the term "resale price maintenance" is broad enough to encompass minimum and maximum resale prices because both forms of price control allow the manufacturer to maintain the resale price of his products, judges and commentators have invariably used the term to refer only to minimum resale price agreements. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 157 (1968) (Harlan, J., dissenting).

5. Justices Powell, Burger, Stewart, Blackmun and Stevens comprised the majority in *GTE Sylvania*. All but Justice Stewart have joined the Court since the *Albrecht* decision, and Justice Stewart was a dissenter in *Albrecht*. The two dissenters in *GTE Sylvania*, Justices Brennan and Marshall were members of the majority in *Albrecht*. Justice White, the author of the *Albrecht* opinion, filed a concurring opinion in *GTE Sylvania* in an attempt to justify the Court's holding without overruling *Schwinn*, 433 U.S. at 59-71.

6. Using a "rule of reason" test, the factfinder weighs all the circumstances to determine whether a restrictive practice unreasonably restricts competition. Justice Brandeis explained this standard in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular

the conduct's unreasonability, is now to be "the prevailing standard of analysis" for litigation under section 1 of the Sherman Act;⁷ a per se rule of illegality should be applied only to conduct that rises to the "demanding standards of *Northern Pac. R. Co.*"⁸ and is conclusively shown to be "manifestly anticompetitive."⁹ The Court endeavored to "make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing."¹⁰

This Article will demonstrate that the *Albrecht* per se rule does not meet the *GTE Sylvania* requirements for imposition of per se illegality and, therefore, should be overruled. The first section of this Article establishes that the *Albrecht* per se rule, like the *Schwinn* per se rule, was not based upon demonstrable economic effect. The second section examines the procompetitive and anticompetitive effects of maximum resale price restraints and concludes that such restraints are not manifestly anticompetitive. The final section of this Article disposes of two obstacles that might be thought to prevent the reversal of *Albrecht*. First, it will be demonstrated that the Supreme Court in *GTE Sylvania* has rejected the "economic freedom" rationale for striking down vertical restrictions and has substituted in its place the analysis utilized in Part III of this Article. Next, it will be shown that the limitation of *GTE Sylvania* in footnote eighteen to nonprice vertical restrictions does not prevent a re-examination of the per se rule when maximum price restrictions are concerned.

II. THE REQUIREMENT OF DEMONSTRABLE ECONOMIC EFFECT

A. *Albrecht*, *GTE Sylvania* and *Their Forerunners*

In *Albrecht*, the Herald Company sold its newspapers through a distribution system of independent carriers that had been used since the newspaper began publication. The carrier, who bought papers at wholesale and resold them at retail, could be terminated after sixty days notice if he charged more than the suggested retail price advertised in the newspaper. Plaintiff carrier, *Albrecht*, adhered to the suggested retail price for several years, but in 1961 he began to overcharge. In 1964, after receiving numerous complaints from customers in *Albrecht's* territory and issuing repeated warnings, the newspaper company sent to *Albrecht* a letter that stated:

remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

7. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1970).

8. 433 U.S. at 50. See note 31 and accompanying text *infra*.

9. *Id.* at 49-50.

10. *Id.* at 58-59.

The system we customarily follow of respecting as exclusive territories of our carriers prevents the normal effect of competition to keep prices down. In order to protect the reading public against artificially high prices in restraint of trade in the territories of overpricing carriers, we have expressed in our statement of policy the intention to compete in such territories by selling the Globe-Democrat at resale ourselves or for resale by another carrier at the lower prices in the over-priced territory.¹¹

The Herald Company hired Milne Circulation Sales, Inc. to solicit the plaintiff's customers for alternate service. The newspaper company assigned those customers who accepted alternate service to another carrier, Kroner, with the understanding that Kroner's route would be terminated in the event that Albrecht cooperated. Albrecht, however, brought a treble damage action under section 1 of the Sherman Act; the Herald Company responded with a sixty-day notice of termination.¹² Albrecht's complaint alleged that the Herald Company had combined with Milne, Kroner, or Albrecht's customers to restrain trade in violation of section 1 of the Sherman Act by attempting to enforce maximum resale prices. The jury found for the Herald Company. The Eighth Circuit affirmed the denial of Albrecht's motion for judgment *n.o.v.* because the Herald Company had acted unilaterally rather than in combination, and because maximum resale prices promoted rather than restrained price competition.¹³

Although the court of appeals' decision in *Albrecht* appeared to be soundly based upon the crucial finding that the newspaper publisher was merely attempting to control the abuse of retail monopolies by his distributors, the Supreme Court reversed. First, the majority found that combinations existed between the Herald Company and Milne, and the Herald Company and Kroner.¹⁴ Second, the Court held that any attempt to enforce maximum resale prices constituted illegal price fixing and, therefore, fell within the same per se rule that condemns minimum resale

11. *Albrecht v. Herald Co.*, 367 F.2d 517, 519 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968).

12. 390 U.S. at 48.

13. *Id.* at 148-49.

14. 390 U.S. at 149-50. The *Albrecht* decision broke new ground in construing the concept of "combination" in § 1 of the Sherman Act. The Court determined that the Herald Company could not be deemed to have acted unilaterally against Albrecht because it hired Milne to solicit customers away from Albrecht and the company was "aware" that the aim of the solicitation campaign was to force Albrecht to lower his prices. *Id.* at 150. Also, the Herald Company combined with Kroner because Kroner knew the Herald Company was using him as "part of a program" to get Albrecht to conform to the advertised price, and because Kroner undertook to deliver papers at the suggested price and "materially aided" in the accomplishment of the Herald Company's plan. *Id.* Furthermore, in the now famous footnote six of the *Albrecht* opinion, the Court stated that other possible combinations under § 1 included the Herald Company and Albrecht, the Herald Company and the other carriers, and the Herald Company and Albrecht's customers. Justice Harlan criticized these various theories of "combination" in his dissent. *Id.* at 160-65 (Harlan, J. dissenting). In addition, commentators have argued that Justice White's expansive interpretation of "combination" in *Albrecht* to mean something other than "contract" or "conspiracy" is an unwarranted interpretation of § 1 of the Sherman Act. See, e.g., Day, *New Theories of Agreement and Combination*, 42 ANTITRUST L.J. 287, 299-301 (1973). See also Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

price fixing.¹⁵ Thus, without economic analysis, the Supreme Court applied a per se rule to maximum resale price restraints.¹⁶

The dissenters in *Albrecht* severely criticized the reasoning of the majority. Justice Harlan stated that "[t]o conclude that no acceptable justification for fixing maximum prices can be found simply because there is no acceptable justification for fixing minimum prices is to substitute blindness for analysis."¹⁷ Justice Stewart, in an opinion joined by Justice Harlan, concluded that to apply a per se rule to maximum resale price restraints when a distributor has a territorial monopoly "stands the Sherman Act on its head."¹⁸

Although *Albrecht* concerned vertical maximum resale price restraints, *GTE Sylvania* presented the problem of nonprice vertical restrictions.¹⁹ The *GTE Sylvania* Court's examination of the *Schwinn* per se rule, however, provides the framework for a similar review of the *Albrecht* per se rule. A brief review of the Supreme Court's experience with nonprice vertical restraints provides the background necessary to understand the impact of *GTE Sylvania* upon *Albrecht*.

*White Motor Co. v. United States*²⁰ was the first nonprice vertical restriction case to reach the Supreme Court.²¹ White Motor Company had imposed geographic limitations on the areas within which its distributors and dealers were permitted to sell trucks and parts. In addition, the company had engaged in other offensive practices, such as price fixing. With respect to the territorial restrictions, the Supreme Court

15. 390 U.S. at 151-54.

16. The Court did suggest possible anticompetitive consequences that could result from maximum price fixing. See notes 96-107 and accompanying text *infra*.

17. 390 U.S. at 157 (Harlan, J., dissenting).

18. *Id.* at 170 (Stewart & Harlan, JJ., dissenting). Justice Douglas also filed a concurring opinion to point out that *Albrecht* was a "rule of reason" case. *Id.* at 154 (Douglas J., concurring). How Justice Douglas could reach that conclusion is beyond the comprehension of this writer; no subsequent court has construed *Albrecht* as a rule of reason case.

19. Vertical nonprice restraints have generally been divided into two categories: (1) territorial restrictions and (2) customer restrictions. Territorial restrictions limit the geographical area in which a distributor may sell the manufacturer's product, and include restrictions of the distributor's place of business or area of operation. Customer restrictions limit the customers to whom a distributor may sell. See generally Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 HARV. L. REV. 795 (1962). The *GTE Sylvania* case dealt with vertical territorial restrictions. Because its share of the television market had been declining steadily over the years, Sylvania decided to change its marketing strategy by selling television sets directly to smaller groups of franchised retailers who were more "aggressive and competent." 433 U.S. at 38. To implement this plan, each selected franchisee was required to sell his Sylvania products from the franchise location. A franchise did not constitute an exclusive territory, however, because Sylvania retained the sole right to increase the number of retailers in an area in light of the success or failure of existing retailers in developing the market. *Id.*

20. 372 U.S. 253 (1963).

21. Prior to 1948, nonprice vertical restrictions were never challenged by the Federal Trade Commission or the Department of Justice. In that year the Antitrust Division of the Justice Department *sua sponte* announced its position that vertical territorial restrictions were per se illegal. *White Motor Co.* was the first case to reach the Supreme Court under the Justice Department's new policy. See Orrick, *Marketing Restrictions Imposed to Protect the Integrity of "Franchise" Distribution Systems*, 36 ANTITRUST L.J. 63, 65 (1967); Timberge, *Territorial Exclusives*, 29 ANTITRUST L.J. 233, 234-36 (1965).

reversed a summary judgment granted in favor of the government on a per se rule of illegality, stating:

We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" (*Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)) and therefore should be classified as *per se* violations of the Sherman Act.²²

Nevertheless, only four years later in *United States v. Arnold, Schwinn & Co.*,²³ the Supreme Court summarily declared certain nonprice vertical restraints to be per se illegal in sale transactions.

To sell its bicycles, Schwinn operated under three plans: (1) selling to distributors who purchased bicycles from Schwinn; (2) selling to retailers by means of consignment or agency arrangements with distributors; and (3) selling to retailers under the "Schwinn plan," which involved direct shipments by Schwinn to the retailer, with Schwinn invoicing the dealers, extending credit, and paying a commission to the distributor taking the order.²⁴ Schwinn's distributors were assigned specific territories for conducting sales. Sales were to be restricted to franchised Schwinn accounts and to be conducted entirely in the area allocated to the individual distributor. In turn, the franchised dealers were required to purchase Schwinn products only from the distributor authorized to serve that area. The dealer could not sell to unfranchised dealers nor could he sell as a wholesaler without bearing the risk of immediate cancellation of his franchise by Schwinn. The Government sought to have this arrangement declared an unreasonable restraint on competition contrary to section 1 of the Sherman Act.²⁵

The Supreme Court affirmed the district court, which had held that when Schwinn sold its products to distributors and imposed territorial restrictions upon resale, a per se violation of the Sherman Act occurred.²⁶ The Court emphasized that once a manufacturer ceases to have ownership rights in its product, the manufacturer may not dictate the location or terms of resale.²⁷ As long as Schwinn continued to possess title to its products, such as under a consignment arrangement or a Schwinn plan, Schwinn could impose territorial restrictions on resale without committing a per se violation because the dealer was acting more like an agent of Schwinn. The Court based this bifurcated treatment on age-old property concepts, that is, once a person acquires title to property, the former owner no longer has the right to interfere with the use of that

22. 372 U.S. at 263.

23. 388 U.S. at 379-80.

24. *Id.* at 370.

25. *Id.* at 367.

26. *Id.* at 379.

27. *Id.*

property.²⁸ The latter portion of this Article discusses the *Schwinn* Court's reliance on property concepts to justify a per se rule of illegality as it affects maximum resale price restraints. It is important to note at this point, however, that the court in *GTE Sylvania* returned to the cautionary *White Motor Co.* approach²⁹ and criticized *Schwinn* for "announc[ing] its sweeping per se rule without even a reference to *Northern Pacific Railway Co.*, and with no explanation of its sudden change in position."³⁰ The Court then proceeded to reexamine *Schwinn* to determine whether its per se rule could be justified under the "demanding standards" of *Northern Pacific*:

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.³¹

The Supreme Court in *Albrecht*, as in *Schwinn*, did not refer to the criteria established in *Northern Pacific* for applying a per se rule of illegality. Thus, in light of *GTE Sylvania*, the *Albrecht* per se rule should be reexamined to determine whether it can be justified under the *Northern Pacific* standard. The precise issue is whether judicial experience with vertical maximum resale price restraints has demonstrated that such business practices "have or are likely to have a 'pernicious effect on competition' or whether they lack . . . any redeeming virtue."³²

In view of the Court's scant experience with maximum resale prices, however, it was premature for the *Albrecht* Court to conclude that vertical maximum resale price restraints are manifestly anticompetitive and should therefore be proscribed by a per se rule of illegality.³³ In fact, prior to *Albrecht*, the Supreme Court's only experience with maximum resale prices was in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*.³⁴

28. *Id.* at 380.

29.

We revert to the standard articulated in *Northern Pac. R. Co.* and reiterated in *White Motor*, for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

433 U.S. at 57.

30. *Id.* at 51.

31. *Id.* at 50 (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

32. The Supreme Court in *GTE Sylvania* determined that nonprice vertical restrictions did not meet the *Northern Pacific* standards. *Id.* at 58.

33. The *Albrecht* per se rule has been severely criticized. See, e.g., W. GELLHORN, ANTITRUST LAW AND ECONOMICS 260-61 (1976); Handler, *Through the Antitrust Looking Glass—Twenty-First Annual Antitrust Review*, 57 CALIF. L. REV. 182, 193-96 (1969); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decision*, 75 COLUM. L. REV. 282, 291-92 (1975); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 257 (1968); Comment, *Maximum Price Fixing: A Per Se Violation of the Sherman Act*, 1969 L. & SOC. ORDER 476 (1969); 10 B.C. IND. & COM. L. REV. 208 (1968); 37 U. CIN. L. REV. 411 (1968). See also Elman, "Petrified Opinions" and Competitive Realities, 66 COLUM. L. REV. 625 (1966).

34. 340 U.S. 211 (1951). Before *Kiefer-Stewart*, the vast majority of cases dealt with minimum or absolute price fixing by sellers. For instance, in *Swift & Co. v. United States*, 196 U.S. 375 (1905), the

In *Kiefer-Stewart*, two affiliated corporations, Seagram and Calvert, entered into an alleged horizontal agreement to impose maximum resale prices on the liquor that they sold to Indiana wholesalers. The Seventh Circuit Court of Appeals held that any agreement among competitors to impose *maximum* resale prices simply did not violate the Sherman Act,³⁵ reasoning that only price-fixing combinations that restrain competition violate section 1. Since price competition rests only upon the freedom to charge lower, not higher, prices, the Seventh Circuit concluded that a maximum resale price agreement promotes competition and benefits the consumer by ensuring lower prices for consumer goods.³⁶ On appeal, however, the Supreme Court reversed in an opinion noted for its brevity.³⁷ In a single paragraph the Court held that a maximum resale price agreement, like a minimum resale price maintenance agreement, was a per se violation of the antitrust laws:

For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in *United States v. Socony-Vacuum Oil Co.*, . . . : "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."³⁸

More than twenty-five years later, the *Kiefer-Stewart* decision provided the rationale for the *Albrecht* holding.³⁹ The *Kiefer-Stewart* case, however, is distinguishable from *Albrecht*. In *Kiefer-Stewart*, the Supreme Court held merely that "an agreement among competitors to fix maximum resale prices of their products" violated the Sherman Act.⁴⁰ By contrast, *Albrecht* involved a vertical maximum resale price agreement

Supreme Court upheld an indictment charging the defendants, in part, with conspiring "to arbitrarily, from time to time raise, lower, and fix prices, and to maintain uniform prices." *Id.* at 392. The Court did not, however, discuss the maximum price fixing charge and it seems that the Court's real concern was the general scheme to monopolize the industry. See Comment, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose or Effect*, 19 U. CHI. L. REV. 837, 843 n.36 (1952). In *Kiefer-Stewart* the Supreme Court relied on broad dictum from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). This reliance on *Socony-Vacuum*, however, has been criticized. For example, former FTC Commissioner Elman writes:

The agreement at issue in *Socony-Vacuum* was an agreement among competitors to restrict the supply of their product; its purpose and effect were to eliminate competition and raise prices. The Court was thus plainly warranted in assimilating the agreement to a conventional price-fixing conspiracy. Indeed, this "price tampering" was tantamount in character and result to such a conspiracy. Certainly the Supreme Court did not hold that any practice by a manufacturer which may affect the resale price is illegal *per se* price fixing; those who say it did ignore the context in which the Court used the phrase and by which it was limited and defined.

Elman, *supra* note 33 at 629. Thus, except for the broad dictum in *Socony-Vacuum*, no court had ruled that a maximum resale price agreement among competitors violated the antitrust laws prior to the *Kiefer-Stewart* decision in 1951.

35. 182 F.2d 228 (7th Cir. 1950), *rev'd*, 340 U.S. 211 (1951).

36. *Id.*

37. See generally Comment, *supra* note 34.

38. 340 U.S. at 213 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)).

39. 390 U.S. at 152-53.

40. 340 U.S. at 213.

between a manufacturer and its distributors, noncompetitors at different levels of the market structure. As Justice Harlan observed in his dissent in *Albrecht*:

[In *Kiefer-Stewart*], the key question was whether there was an actual horizontal combination of manufacturers to impose on retailers a maximum resale price. The Court refused to hold that dictation of price ceilings to a single retailer by a single manufacturer was unlawful, but instead insisted upon, and found, a situation in which two manufacturers, in their common interest, combined to impose upon retailers a condition of doing business which they might not have been able to demand individually.⁴¹

Prior to *Albrecht*, the circuits were sharply divided on whether *Kiefer-Stewart* dictated a per se rule against a single manufacturer imposing price ceilings on products sold to distributors. The Fifth Circuit construed *Kiefer-Stewart* to establish a per se rule,⁴² but the First⁴³ and Eighth Circuits⁴⁴ upheld price ceilings imposed by a single manufacturer on its distributors, basing their decisions in part upon the crucial finding that vertical maximum resale price restraints promoted competition.

B. *The Minimum Price-Fixing Analogy*

It appears proper to characterize maximum resale price restraints and minimum resale price agreements as different forms of the same condemned practice. Such an approach, however, circumvents the real issue: Whether maximum resale price restraints have the same pernicious effect on competition as minimum resale price agreements. Yet in *Kiefer-Stewart* and *Albrecht*, the Supreme Court avoided the task of showing maximum resale price restraints to be anticompetitive by analogizing them to the dissimilar minimum resale price restraints before it. Upon close scrutiny, the analogy between minimum and maximum price fixing cannot be justified. As Justice Harlan states in his dissent in *Albrecht*, "[t]he practice of setting genuine price 'ceilings,' that is maximum prices, differs from the practice of fixing minimum prices, and no accumulation of pronouncements from the opinions of this Court can render the two

41. 390 U.S. at 164 (Harlan, J., dissenting).

42. *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346, 349 (5th Cir. 1965). The Fifth Circuit held on the basis of *Kiefer-Stewart*, that the oil company's attempt to compel Broussard, a gasoline station operator, to reduce his pump prices constituted a per se violation of § 1 even though the alleged purpose of the defendant's action was to promote competition. *Id.*

43. *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967). The facts were similar to *Broussard*. Mobil Oil Co., dissatisfied with the high pump prices being charged by Quinn, applied various pressures and eventually terminated Quinn's dealership contract. The First Circuit held the contract termination was unilateral, and, therefore, the combination requirement of § 1 had not been met. *Id.* at 276. In a separate concurring opinion, Judge Coffin pointed out that even if Quinn had proved the existence of a combination, he would distinguish *Kiefer-Stewart* and would not find an attempt by a single manufacturer to impose price ceilings to be a per se violation of the antitrust laws. *Id.* at 276-78 (Coffin, J., concurring).

44. *Albrecht v. Herald Co.*, 367 F.2d 517 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968).

economically equivalent."⁴⁵ That is, if a manufacturer establishes maximum prices, a reseller is still free to offer a lower price for the manufacturer's product in the face of price competition from another reseller.

Unlike maximum resale price agreements, vertical minimum resale price agreements were early declared per se illegal by the Supreme Court. The 1911 case of *Dr. Miles Medical Co. v. John D. Park & Sons*⁴⁶ held that an agreement between a drug manufacturer and its customers to maintain a minimum resale price constituted a per se violation of the Sherman Act.⁴⁷ The medical company had routinely sold products to wholesale druggists who resold the products to retail stores for consumer sales. The Dr. Miles Company required each of its wholesalers and jobbers to sell the drugs at itemized prices and also to obtain similar pricing agreements from the retail stores.⁴⁸ Thus, the manufacturer was able to fix the prices of its products down the entire chain of resale. In concluding that these agreements constituted per se violations of the Sherman Act, the Court equated the effects of minimum resale price agreements with horizontal price fixing among dealers.⁴⁹ The Supreme Court has subsequently reaffirmed this analogy.⁵⁰

In response to *Dr. Miles*, pressure was put on Congress to permit exemptions to the per se rule prohibiting minimum resale price agreements. These lobbying efforts eventually resulted in the passage of the Miller-Tydings Act⁵¹ and the McGuire Act.⁵² These statutes permitted states to enact "fair trade" laws authorizing sellers to establish minimum or stipulated resale prices for branded commodities. Forty-six states have operated under fair trade legislation.⁵³ In the 1970s, however, several states repealed their fair trade laws.⁵⁴ Eventually the Consumer Goods Pricing Act of 1975 was enacted to repeal the Miller-Tydings and McGuire Acts.⁵⁵ The principal impetus for this turnabout was that empirical studies undertaken by the Antitrust Division of the Justice Department and others⁵⁶ had revealed that minimum resale price maintenance agreements tended to produce artificially high prices.

45. 390 U.S. at 156 (Harlan, J., dissenting).

46. 220 U.S. 373 (1911).

47. *Intrabrand* competition refers to competition between *distributors* of the same product, while *interbrand* competition occurs between *manufacturers* of the same generic product. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).

48. 220 U.S. at 374.

49. *Id.* at 408.

50. See, e.g., *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920).

51. Ch. 690, 50 Stat. 693 (1937) (repealed 1975). See note 55 and accompanying text *infra*.

52. Ch. 745, 66 Stat. 631 (1952) (repealed 1975). See note 55 and accompanying text *infra*.

53. See 2 TRADE REG. REP. (CCH) 6041 (1978).

54. See ANTITRUST LAW DEVELOPMENTS 9-14 (1975).

55. 15 U.S.C. § 45 (1975) (amending 15 U.S.C. § 45(a) (1970)).

56. See *Hearings on S.408 Before the Subcomm. on Antitrust and Monopoly of the Senate*

Because a vertical minimum resale price maintenance agreement benefits the distributor by eliminating intrabrand price competition, courts have recognized that a series of vertical agreements between a manufacturer and each of his distributors can create a cover for horizontal price fixing among the distributors.⁵⁷ It was this suspicion that prompted the Supreme Court to adopt a *per se* rule against minimum resale price agreements in *Dr. Miles*: "[T]he complainant can fare no better with its plan of identical contracts than could dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other."⁵⁸ In other words, organized distributors can pressure an unwilling manufacturer into adopting minimum resale price agreements in order to protect dealer profit margins. During the 1975 Senate Fair Trade Hearings, one Justice Department official testified that " 'fair trading' historically resulted from pressure upon producers by retailers, and . . . chiefly benefits retailers by insulating them from price competition."⁵⁹

Hence, a *per se* rule against minimum resale price agreements has been justified for two reasons. First, minimum resale price agreements substantially reduce price competition in a manufacturer's product among its distributors. In *Albrecht*, Justice Harlan argued that this fact alone justified a *per se* minimum resale price agreement rule:

[P]rice floors are properly considered *per se* restraints, in the sense that once a combination to create them has been demonstrated, no proffered justification is an acceptable defense. Following the rule of reason, combinations to fix price floors are invariably unreasonable; to the extent that they achieve their objective, they act to the direct detriment of the public interest as viewed in the Sherman Act.⁶⁰

Second, minimum resale price agreements are unlikely to be created absent pressure from resellers. Thus, as Justice Harlan further stated, "[I]t is frequently possible to infer a combination of resellers behind what is presented to the world as a vertical and unilateral price policy, because it is the resellers and not the manufacturer who reap the direct benefit of the policy."⁶¹

In stark contrast to the anticompetitive effects resulting from min-

Judiciary Comm., 94th Cong., 1st Sess. 174 (1975) (cited in MONOGRAPH, *supra* note 3, at 79 n.327) [hereinafter cited as 1975 Senate Fair Trade Hearings].

57. See, e.g., B. YAMEY, *RESALE PRICE MAINTENANCE* 96-97 (1966); Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. CHI. L. REV. 825 (1955); Cassidy, *Maintenance of Resale Prices by Manufacturers*, 53 Q. J. ECON. 454 (1939); Grether, *Experience in California With Fair Trade Legislation*, 24 CALIF. L. REV. 640 (1936); and sources cited in 1975 Senate Fair Trade Hearings, *supra* note 56, at 175 n.5 (cited in MONOGRAPH, *supra* note 3, at 79 n.328).

58. 220 U.S. at 408.

59. 1975 Senate Fair Trade Hearings, *supra* note 56, at 174 (cited in MONOGRAPH, *supra* note 3, at 79 n.326).

60. 390 U.S. at 157 (Harlan, J., dissenting).

61. *Id.*

imum resale price agreements, no empirical study demonstrates that maximum resale price agreements achieve comparable results. Judges and commentators, who have evaluated the effects of maximum resale price agreements, have invariably concluded that maximum resale price agreements *promote* competition by providing the manufacturer with an effective tool for counteracting the anticompetitive effects of reseller monopolies.⁶²

III. THE COMPETITIVE EFFECTS OF VERTICAL MAXIMUM RESALE PRICE RESTRAINTS

This section of the Article examines the competitive effects of vertical maximum resale price restraints and demonstrates that the *Albrecht* per se rule does not meet the criteria for applying the per se rule enunciated in *GTE Sylvania*.⁶³ The Supreme Court in *GTE Sylvania* reaffirmed the rule of reason: In determining whether a particular commercial practice is manifestly anticompetitive, "[t]he probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences."⁶⁴ Vertical maximum resale price restraints have two major procompetitive consequences. First, such restraints allow a manufacturer to control distributor monopolies. Second, they promote independent distributorship systems and prevent forward vertical integration. When these two procompetitive effects are weighed against the alleged anticompetitive effects, it is clear that vertical maximum resale price restraints are not manifestly anticompetitive.

A. *Procompetitive Effects of Vertical Maximum Retail Price Restraints*

1. *Controlling Distributor Monopolies*

Vertical maximum resale price restraints allow a manufacturer to control distributor monopolies. As Justice Harlan stated in *Albrecht*: "Since price ceilings reflect the manufacturer's view that there is insufficient competition to drive down prices to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits."⁶⁵ As the Eighth Circuit also concluded: "Globe-Democrat's activity here did not hinder, but fostered and actually created competition to the benefit of the public. To

62. *Albrecht v. Herald Co.*, 390 U.S. 145, 159 (1968) (Harlan, J., dissenting), *reversing*, 367 F.2d 517, 524-25 (8th Cir. 1966); *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 276-78 (1st Cir. 1967) (Collins, J., concurring). See also Comment, *supra* note 34, at 843.

63. See note 31, and accompanying text *supra*.

64. 433 U.S. at 50 n.16.

65. 390 U.S. at 159 (Harlan, J., dissenting).

have condoned plaintiff's overcharging would have been a signal to all carriers, each monopolistic in his own right, to mulct the public for all the traffic would bear."⁶⁶

Economists also support the utilization of vertical maximum resale price restraints as a defensive measure for controlling distributor monopolies. For example, Professor Bork writes:

Maximum resale price fixing may . . . be a means by which a manufacturer controls the misuse of a reseller's local monopoly. This situation may arise where both the manufacturer and the reseller possess market power. . . . The manufacturer may wish to fix maximum resale prices to insure that the reseller does not, in its independent interest, restrict output further than is in their collective interest.⁶⁷

Moreover, Professor Bork argues that maximum resale price restraints should be used by a manufacturer to break up a horizontal price-fixing cartel among his distributors: "If a manufacturer knows, or suspects but cannot prove, that resellers have cartelized, the manufacturer can provide a powerful incentive for resellers to defect from the cartel by refusing to sell to those that comply with the cartel's price agreement. Maximum resale price fixing accomplishes that purpose."⁶⁸ Thus, in stark contrast to minimum resale price restraints that facilitate dealer cartelizing, maximum resale price restraints provide the manufacturer with a weapon to *combat* dealer cartels.

Recall the facts of *Albrecht*. If an independent newspaper distributor in some desolate area arbitrarily decides to raise his prices, his customers often can only choose between accepting higher prices or cancelling their subscriptions. Since a newspaper is a perishable product that must be delivered promptly to customers in a concentrated area, it is not feasible for newspaper distributors to compete with each other beyond the areas within which regular deliveries may be efficiently completed. Thus, independent newspaper distributors like *Albrecht* have naturally protected territorial monopolies.⁶⁹

The *Albrecht* decision undoubtedly has had a severe impact on the newspaper industry by effectively guaranteeing a preferred status to retail monopolies. Evidence indicates that since *Albrecht*, newspaper publishing companies have experienced sharp declines in circulation due to resale

66. 367 F.2d 517, 522 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (1968). The only major study of the *Kiefer-Stewart* case concludes that although the Court's motive for imposing maximum prices was to stimulate competition; the ruling in *Kiefer-Stewart* may have disarmed manufacturers of one of their few weapons against monopolistic distributors. Comment, *supra* note 34, at 843.

67. Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division II*, 75 YALE L.J. 373, 464-65 (1966).

68. *Id.* at 464.

69. See *A Bill to Repeal the Fair Trade Laws--Newspaper Exemption Amendment: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 394, 657-58 (1975) (testimony of William C. Green, Jr.) [hereinafter cited as *Newspaper Hearings*].

price increases by their independent distributors.⁷⁰ Vertical maximum resale price restraints would allow the newspaper publisher to control the abuse of these retail monopolies. Aware of this potential lever, the newspaper industry strongly supported a 1975 bill designed to overrule *Albrecht* by exempting maximum resale price restraints from the antitrust laws.⁷¹

In *Albrecht*, however, the Supreme Court expressly rejected the monopolistic-distributor justification for maximum price fixing.⁷² Initially, the Court stated that the court of appeals was not entitled to rely upon this justification because "neither the existence of exclusive territories nor the economic power they might place in the hands of the dealers was at issue before the jury."⁷³ Thus, if distributor monopoly power had been proved, then the Herald Company might have been able to impose maximum prices as a defensive measure. Declining to reach this conclusion, however, the Court reasoned that if the distributors had monopoly power, their exclusive territories would be illegal, and, consequently, the "entire scheme" would be illegal under section 1:

The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act.⁷⁴

The reasoning of the Supreme Court in *Albrecht* has been seriously undermined by the *GTE Sylvania* decision. In *GTE Sylvania*, the Supreme Court held that nonprice vertical restrictions, such as granting a distributor an exclusive territory, do not have pernicious consequences and therefore must be evaluated under a rule of reason standard.⁷⁵ A manufacturer is permitted to artificially create exclusive territories for its distributors, and artificially reduce intrabrand competition among them. In order to counteract the potential abuse of this reduction in competition by distributors granted exclusive territories, a manufacturer should instead have multiple distributors subject to restraints on the vertical maximum resale price. One commentary on the *GTE Sylvania* decision has argued that, on this basis, *Albrecht* should be reconsidered:

The *Albrecht* Court . . . felt that a price ceiling was not justified simply "because it blunts the pernicious consequences" of vertically imposed territorial restraints. *Sylvania*, however, concluded that such nonprice restraints

70. See note 85 and accompanying text *infra*.

71. See *Newspaper Hearings*, *supra* note 69.

72. 390 U.S. at 153-54.

73. *Id.* at 153.

74. *Id.* at 154.

75. Although *GTE Sylvania* concerned location restrictions and not exclusive territories, the decision was not limited to its facts and applies to all nonprice vertical restrictions. 433 U.S. at 51 n.18.

may be desirable. Once the manufacturer is permitted to create a "retail monopoly" in order to promote goodwill by providing point-of-sale services, it should also be given the opportunity to restrict the accompanying danger by placing a ceiling on the retailer's markup.⁷⁶

The *GTE Sylvania* Court was not particularly concerned with the potential anticompetitive effects of distributor monopolies because "[a]lthough intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations, and, perhaps more importantly, to purchase the competing products of other manufacturers."⁷⁷ Although this statement was unsupported by market evidence, it is reasonable because Sylvania's share of the television market was relatively small (only five percent at the time of the suit), and television sets are highly interchangeable products.⁷⁸ *GTE Sylvania* should not be limited to its facts. The clear import of the decision is that a rule of reason standard should be applied to nonprice vertical restrictions generally.⁷⁹ Moreover, even though franchisees as a whole do not possess monopoly market power, particular franchisees, by virtue of their location or advertising efforts, might have natural monopoly power. For example, the Court's reasoning in *GTE Sylvania* assumes that the consumer will go to another franchised location, or will buy a different brand television set. But what if the Sylvania franchisee is the only television dealer in the surrounding area? This is not a remote possibility. For example, declining sales in the San Francisco area, caused by an additional markup of \$50 to \$100 per set by Continental T.V., prompted Sylvania to open a new franchise in Continental's territory.⁸⁰

2. *The Prevention of Forward Vertical Integration*

A manufacturer must develop a distribution system to distribute its product to the consumer. A manufacturer that uses its own employees to distribute and market its goods can impose whatever post-sale restrictions it wants upon its distributors; the antitrust laws simply do not apply. If, however, the manufacturer cannot afford to develop its own distribution network, it must rely on some form of independent distributorship system—loosely called franchising⁸¹—that is subject to the antitrust laws

76. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 241 (1977).

77. 433 U.S. at 54.

78. *Id.* at 38.

79. *Id.* at 51 n.18.

80. Brief for Respondent at 12, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

81.

According to the FTC Ad Hoc Committee on Franchising, "[t]he term franchise as used in the business world has been applied so indiscriminately, and to such diverse business arrangements, as to defy consistent definition. At one extreme, it is a simple grant from one party to another to sell the granting party's goods. At the other extreme, a franchise relationship is a complex business arrangement in which the franchisor licenses his trade

relating to vertical restrictions. An independent distributorship system coupled with vertical restrictions provides the manufacturer a viable alternative to an internal system of distribution, thus reducing forward vertical integration.⁸²

The *Schwinn* and *Albrecht* decisions have been severely criticized for taking away a manufacturer's right to control its independent distributors through a network of vertical restrictions.⁸³ By holding that vertical restrictions were per se illegal in *Schwinn* and *Albrecht*, the Supreme Court has accelerated the forward vertical integration of independent distributorship systems. For example, after the *Schwinn* decision, Arnold, Schwinn and Company vertically integrated forward. As one commentator observed:

If the Court's purpose was to liberate Schwinn's 22 cycle distributors from Schwinn's influence, the decision succeeded—but scarcely in a pro-competitive way. Instead, the distributors were *entirely* liberated from the Schwinn distribution process; Schwinn elected to cope with the vagaries of the Court's decision by emulating General Motors, eliminating the middle layer in its distribution organization, and substituting its own warehouse facilities for those of the cycle distributors.⁸⁴

The *Albrecht* decision has also had a severe impact on the newspaper industry. A newspaper's profits are largely derived from advertising revenues, which in turn are based on circulation rates. Consequently, the

name and trademark, imparts in confidence his know-how, and on a continuing basis, provides guidance and details concerning the precise manner in which the franchisee must operate his establishment."

Report of Ad Hoc Committee on Franchising to the FTC 5 (June 2, 1969), noted in MONOGRAPH, *supra* note 3, at 1 n.2.

82. It is an established commercial fact that franchising allows the small manufacturer to effectively compete with the large vertically integrated giants of many industries. See generally, H. BROWN, *FRANCHISING REALITIES AND REMEDIES* (1973); H. KURSH *THE FRANCHISE BOOM* (1968); F. LEWIS & R. HANCOCK, *THE FRANCHISING SYSTEM OF DISTRIBUTION* (1968); SMALL BUSINESS ADMINISTRATION FOR THE SENATE SELECT COMMITTEE ON SMALL BUSINESS, *REPORT ON THE ECONOMIC EFFECTS OF FRANCHISING*, 92D CONG. 1ST. SESS. (1971).

83. *Albrecht v. Herald Co.*, 390 U.S. 145, 156 (1968) (Harlan, J., dissenting); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 386-88, 394 (1967) (Stewart, J., concurring and dissenting). See also Averill, Sealy, Schwinn and Sherman One: *An Analysis and Prognosis*, 15 N.Y.L.F. 39 (1969); Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where*, 44 ANTITRUST L.J. 537 (1975); Chadwell & Rhodes, *Antitrust Aspects of Dealer Licensing and Franchising*, 62 NW. U.L. REV. 1 (1967); Jones, *The Growth and Importance of Franchising and the Role of the Law*, 12 ANTITRUST BULL. 717 (1967); Keck, *Alternative Distribution Techniques—Franchising, Consignment, Agency and Licensing*, 13 ANTITRUST BULL. 177 (1968); Keck, *The Schwinn Case*, 23 BUS. LAW 669 (1968); McLaren, *Marketing Limitation on Independent Distributors and Dealers—Prices, Territories, Customers, and Handling of Competitive Products*, 13 ANTITRUST BULL. 161 (1968); Orrick, *Marketing Restrictions Imposed to Protect the Integrity of "Franchise" Distribution Systems*, 36 ANTITRUST L.J. 63, 65 (1967); Phillips, *Schwinn Rules and the "New Economics" of Vertical Relationships*, 44 ANTITRUST L.J. 573 (1975); Pollock, *Alternative Distribution Methods after Schwinn*, 63 NW. U.L. REV. 595 (1968); Preston, *Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards*, 30 LAW & CONTEMP. PROB. 507 (1965); Sfikas, *Antitrust Consequences of Vertical Restrictions*, 56 ILL. B.J. 1028 (1968); Stewart, *Antitrust Considerations Involved in Product Distribution*, 19 BUS. LAW 967 (1964); Zeidman, *The Growth and Importance of Franchising—Its Impact on Small Business*, 12 ANTITRUST BULL. 1191 (1967).

84. Pollock, *The Schwinn Per Se Rule: The Case for Reconsideration*, 44 ANTITRUST L.J. 557, 569-70 (1975).

newspaper industry has a particularly keen interest in controlling the pricing policies of its independent distributors. Since *Albrecht*, many newspaper distributors have increased their prices; circulation has fallen. Testimony before the Senate Subcommittee on Antitrust and Monopoly pointed out that: "[throughout] the country there have been a number of newspapers which had losses of circulation in recent years. From the information available . . . it would appear that a substantial part of these losses were caused by price increases by dealers."⁸⁵

Because newspaper publishers lost control over the pricing policies of their distributors after *Albrecht*, the larger publishers have simply skirted the antitrust obstacle by vertically integrating forward. The outcropping of antitrust suits brought by disgruntled independent newspaper distributors, who have either been terminated completely or forced to become agents or employees, substantiates that newspaper publishers with sufficient capital have vertically integrated forward.⁸⁶ In contrast, however, smaller newspaper companies that do not have the necessary capital to convert to an internal system of distribution have simply gone out of business.⁸⁷

From a purely economic standpoint, a manufacturer chooses an independent-distributorship method of distribution, because it perceives this system to be economically most efficient.⁸⁸ Only the larger, well-

85. *Newspaper Hearings*, *supra* note 69, at 394 (testimony of Robert E. Nelson). For example: The Los Angeles Herald-Examiner lost control of prices a year or so ago and substantial losses have indeed been sustained. According to the most recent Audit Bureau of Circulation Report, covering the six months ending March 31, 1975, the Herald-Examiner's average daily circulation was down 37,140 copies and Sunday was off 65,543 copies from the corresponding period of 1974. During that same period the Los Angeles Times was able to maintain uniform pricing policies and, despite a general increase in home delivery rates, average daily circulation declined only 12,626 while Sunday circulation increased by 4,235 copies.

Id. at 396.

86. See, e.g., *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Newberry v. Washington Post Co.*, 438 F. Supp. 470, 484 (D.D.C. 1977); *Lamarca v. Miami Herald Publishing Co.*, 395 F. Supp. 324 (S.D. Fla. 1975), *aff'd mem.*, 524 F.2d 1230 (5th Cir. 1975); *Millkarek v. Miami Herald Publishing Co.*, 388 F. Supp. 1002 (S.D. Fla. 1975). In *Newberry v. Washington Post Co.*, the court observed:

The Post shifted to the agency system largely as a result of the Supreme Court's ruling in *Albrecht*, which cast doubt on the legality of systems of dealer distribution, such as the Post's, then employed by many newspapers across the country. After an unsuccessful effort by the industry to obtain relief from the Congress, the Post determined that a different method of distribution was desirable to avoid the business risks involved and to assure orderly pricing of its product.

438 F. Supp. 470, 484 (D.D.C. 1977).

87. For example, testimony before the Senate Subcommittee on Antitrust and Monopoly revealed that

[t]he total circulation of New York newspapers has declined steadily for many years. . . . Seven New York newspapers had a combined circulation of 5.2 million in 1960. Only three are being published today and their combined circulation has dropped to about 3.5 million! Retail prices, which have advanced substantially in recent years, were not totally responsible for these losses but certainly were a contributing factor.

Newspaper Hearings, *supra* note 69, at 396 (remarks of Mr. Nelson).

88. See, e.g., *Bork*, *supra* note 67, at 429-65; *Posner*, *supra* note 33, at 283-99.

established firms can afford the huge capital investment required to vertically integrate forward.⁸⁹ When a *per se* rule of illegality is applied to vertical restrictions, "[t]he result for some manufacturers may be a sad choice between a law suit or less effective distribution."⁹⁰ Moreover, smaller manufacturers may be deterred from entering or expanding into a particular market because they will not be able to effectively utilize the independent distributorship system.⁹¹ Smaller manufacturers who do enter the market are automatically put at a competitive disadvantage because larger manufacturers can afford to vertically integrate forward and obtain the competitive benefits flowing from their power to impose post-sale restrictions on their distributors.⁹²

In *GTE Sylvania*, the Supreme Court found the threat of forward vertical integration to be a compelling factor for overruling the *Schwinn* *per se* rule:

We also note that *per se* rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen.⁹³

The same reasoning justifies overruling the *Albrecht* *per se* rule. After *Albrecht*, many newspapers closed down or vertically integrated forward. Like nonprice vertical restrictions, vertical maximum resale price restraints are often necessary if the manufacturer is going to be able "to achieve efficiencies that it perceives as important to its successful operation."⁹⁴ As former FTC Commissioner Elman observed: "Of all the elements in the marketing strategy of a manufacturer of consumer goods, probably none is so crucial to his competitive survival and success as the price at which his goods are offered for sale to the public."⁹⁵

89. See, e.g., Jones, *supra* note 83, at 719-21. Vertical integration forward could occur either by merger or by internal expansion. Expansion by the former method may not entail the expense required when expansion occurs internally. Either method, however, will generally be more costly than an independent-distributor relationship.

90. Pollock, *supra* note 83, at 610.

91. See, e.g., *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964); *Snap-on Tools v. FTC*, 321 F.2d 825 (7th Cir. 1963).

92. Jones, *supra* note 83, at 720:

The need for adequate distribution channels which will effectively promote the manufacturers' goods spurs many large corporations who can afford the cost to integrate vertically forward so that they can control their product all the way from the plant to the retail counter from which the retailer will purchase. This alternative is open, however, only to the largest corporations and frequently only to those with a relatively large product mix which can utilize the same distribution channels. Their smaller and more specialized competitors with fewer financial resources and a less diverse product mix must depend for their economic survival on their ability to establish strong distribution organizations.

93. 433 U.S., at 57 n.26.

94. *Id.*

95. Elman, *supra* note 33, at 631. See also Borowitz, *Pricing Problems in Distributor and*

B. *Some Alleged Anticompetitive Effects of Maximum Resale Price Restraints*

In *Albrecht*, the Supreme Court suggested several anticompetitive effects that might occur if vertical maximum resale price restraints were not condemned by a per se rule of illegality.⁹⁶ The anticompetitive effects, however, were not shown actually to exist in the *Albrecht* case, or in any other case. To apply a per se rule under such circumstances completely thwarts the intent of Congress in enacting section 1 of the Sherman Act. As Justice Harlan states in his dissent in *Albrecht*: "The question . . . is not whether dictation of maximum prices is ever illegal, but whether it is always illegal."⁹⁷ Moreover, the traditional rule of reason standard measures the net competitive effect of a commercial practice upon competition. Only if the anticompetitive effects of the practice outweigh its procompetitive effects is the practice declared to be illegal under section 1. The *GTE Sylvania* decision exemplifies this balancing principle. The Court was willing to tolerate the elimination of intrabrand competition because, on balance, a greater amount of interbrand competition was created.⁹⁸ Thus, even if a vertical maximum resale price restraint can be shown to have anticompetitive effects in a particular case, it must also be shown that those anticompetitive effects outweigh the proven procompetitive effects.

The first anticompetitive consequence proffered by the *Albrecht* Court was that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay."⁹⁹ As Professor Posner points out: "[This] reason implies that the manufacturers misconceive their self-interest, and seems hardly an appropriate basis for a per se rule."¹⁰⁰ Why would a manufacturer establish a maximum resale price that would decrease his output? The fundamental assumption of antitrust economics is that a firm seeks to maximize its profits. Certainly, a manufacturer would not seek to prevent its distributors from providing point of sale services that increase product marketability and total output.¹⁰¹

This first economic argument makes it apparent that the Supreme Court did not understand, or refused to accept, the basic fact that a maximum resale price restraint is primarily a "defensive" measure used by the manufacturer to increase the overall competition in its product. For

Franchise Systems, 38 U. CIN. L. REV. 258 (1969); Comment, *Antitrust Limitations on Price Maintenance, Market Division and Quality Controls in Franchise Agreements*, 23 Sw. L.J. 671 (1969).

96. 390 U.S. at 152-53.

97. 390 U.S. at 165 (Harlan, J., dissenting).

98. 433 U.S. at 51-59.

99. 390 U.S. at 152-53.

100. Posner, *supra* note 33, at 292.

101. See generally Bork, *supra* note 67, at 429-65; Posner, *supra* note 33, at 283-99.

example, the Court also argued that "schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market."¹⁰² Once again, the Supreme Court misconceives the manufacturer's interest in imposing maximum resale prices. The manufacturer does not want to destroy the distributors that it needs to distribute its product.

Second, the Supreme Court stated that "[m]aximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition."¹⁰³ This argument appears to be a corollary of the first. If a manufacturer sets its maximum resale price level too low, most resellers will be forced out of business because they will not be able to provide the necessary point of sale services to sell the manufacturer's product at a profit. Therefore, only a few large or specifically advantaged dealers will survive. This argument again ignores the manufacturer's interest in profit maximization. Certainly a manufacturer will attempt to minimize its distribution costs, but only to the extent of increasing its profits.¹⁰⁴ If the distributor wants to make excessive profits, or to be inefficient, then to the extent a maximum resale price restraint forces these resellers out of the distribution business, the restraint promotes the underlying policies of the Sherman Act.

Third, the *Albrecht* Court stated that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices."¹⁰⁵ What the Supreme Court is actually saying is that maximum resale prices could become a disguise for minimum price fixing. As one commentator on *Albrecht* points out: "There seems to be no reason why this is or should always be true. To surmount the majority's suspicion, it is only necessary to show that a difference between the market price and the announced maximum price exists."¹⁰⁶ Indeed, it is possible that a manufacturer could be coerced by its resellers to adopt a maximum resale price agreement that, in reality, was a minimum resale price agreement, but this possibility can be policed adequately under the rule of reason standard.¹⁰⁷

102. 390 U.S. at 152.

103. *Id.* at 153.

104. The Supreme Court recognized this economic argument in *GTE Sylvania*:

"Generally, a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues". . . . In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution," which it would prefer to minimize.

433 U.S. at 56 n.24.

105. 390 U.S. at 153.

106. Comment, *supra* note 33, at 485.

107. On balance, it would seem more appropriate to develop a "sham" exception to the rule of reason standard for vertical maximum resale price restraints.

Finally, although unarticulated in the *Albrecht* decision, another possible anticompetitive consequence is that maximum resale prices could be used offensively by the manufacturer to keep his profits at a low enough level to discourage the market entry of new competitors. This potential anticompetitive consequence merely presents a question of fact concerning the manufacturer's motive, which can also be policed adequately under the rule of reason standard. When the procompetitive effects of vertical maximum resale price restraints are balanced against the alleged anticompetitive effects, it becomes abundantly clear that the *Albrecht* per se rule cannot meet the standards enunciated in *GTE Sylvania*.

IV. SOME ADDITIONAL OBSERVATIONS

A. *Discarding Antiquated Notions of Economic Freedom: GTE Sylvania*

The *GTE Sylvania* decision marks a complete reversal of the Supreme Court's policy toward vertical restrictions. For years the Supreme Court has relied upon notions of "economic freedom," derived from ancient property concepts, to justify outlawing manufacturer-imposed vertical restrictions. In *Dr. Miles*,¹⁰⁸ Justice Hughes relied in part upon the common-law doctrine against equitable servitudes on chattels to support his conclusion that a per se rule should be applied to minimum resale price restraints:

"If a man," says Lord Coke, . . . "be possessed of a horse or any other chattel, real or personal, and gives his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest and property is out of him, so as he hath no possibility of reverter; and it is against trade and traffic and bargaining and contracting between man and man."¹⁰⁹

Later decisions interpreted *Dr. Miles* to mean that a manufacturer unduly interferes with the economic freedom of his distributors if he attempts to impose post-sale restrictions upon his products. For example, in *United States v. A. Schrader's Son, Inc.*,¹¹⁰ the Supreme Court held that minimum resale prices were per se illegal because those agreements were "designed to take away dealers' control of their own affairs and thereby destroy competition."¹¹¹

In *Schwinn*, the Supreme Court once again relied upon the common-law doctrine against equitable servitudes on chattels in the context of nonprice vertical restrictions.¹¹² The pivotal fact in *Schwinn* was the

108. See note 46 and accompanying text *supra*.

109. 220 U.S. at 404-05.

110. 252 U.S. 85 (1920).

111. *Id.* at 100.

112. 388 U.S. at 379.

passage of title. All nonprice vertical restrictions were held to be per se illegal when title passed, but such restrictions were evaluated and sustained under the rule of reason when title had not passed.¹¹³ The *Schwinn* Court held that to impose nonprice vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation."¹¹⁴ Less than a year later, the *Albrecht* Court summarily applied a per se rule of illegality to vertical maximum resale price restraints by stating that maximum resale price agreements, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."¹¹⁵

In *GTE Sylvania*, the Supreme Court flatly rejected the alienation of property rationale by relegating its importance to a footnote.¹¹⁶ More importantly, the Court rejected the "economic freedom" justification for outlawing vertical restrictions:

We are similarly unable to accept Judge Browning's interpretation of *Schwinn*. In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality and quantity of goods and services" This view is certainly not explicit in *Schwinn*, which purports to be based on an examination of the "impact (of the restrictions) upon the marketplace." . . . Competitive economies have social and political as well as economic advantages . . . , but an antitrust policy divorced from market considerations would lack any objective benchmarks.¹¹⁷

Thus, the *GTE Sylvania* decision makes clear that notions of economic freedom based upon ancient property concepts cannot substitute for a demonstration that vertical restrictions have actual, anticompetitive effects in the marketplace. This new approach by the Court provides an additional reason for overruling *Albrecht*.¹¹⁸

113. *Id.* at 379-80.

114. *Id.* at 380.

115. 390 U.S. at 152 (quoting *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951)).

116. Footnote 21 provides in relevant part:

The Court also stated that to impose vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation." . . . We quite agree with Mr. Justice Stewart's dissenting comment in *Schwinn* that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today."

433 U.S. at 53 n.21.

117. *Id.*

118. Another important aspect of the *GTE Sylvania* decision is the Court's recognition that vertical restrictions have "redeeming virtues." *Id.* at 54. The Court took judicial notice that there is substantial scholarly and judicial authority supporting their economic argument that "[v]ertical restrictions promote interbrand competition by allowing the manufacturers to achieve certain efficiencies in the distribution of his product." *Id.* at 54. Professor Posner recently wrote: "Another precedent threatened by *Sylvania* is *Albrecht v. Herald Co.* . . . The logic of *Sylvania* is that restrictions imposed on dealers by manufacturers promote interbrand competition and are therefore not per se illegal, save perhaps if the manufacturer has a monopoly. That logic demolishes *Albrecht*." Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 12 (1977).

B. *The Effect of Footnote Eighteen*

Although *GTE Sylvania* sets the stage for overruling *Albrecht*, a potential obstacle is created by the Supreme Court's express limitation of the impact of its decision to *nonprice* vertical restrictions. In footnote eighteen of the opinion, the Court stated: "As in *Schwinn*, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy."¹¹⁹ Close examination of footnote eighteen, however, reveals the Court was referring only to minimum price restrictions. For example, only the *per se* rule of illegality for minimum resale price agreements has been "established firmly for many years"; the *per se* rule of illegality for vertical maximum resale price restraints was established in *Albrecht*, which was not decided until almost a year after the *Schwinn* *per se* rule that was overruled in *GTE Sylvania*. Furthermore, in illustrating the "significantly different questions of analysis and policy," the Court reveals that its real concern is with minimum resale price agreements:

In his concurring opinion in *White Motor Co. v. United States*, Mr. Justice Brennan noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." 372 U.S. 253, 268 (1963). Professor Posner also recognized that "industrywide resale price maintenance might facilitate cartelizing."¹²⁰

Only minimum price fixing "reduce[s] price competition . . . among sellers of the affected product," and only minimum price fixing can "facilitate cartelizing."¹²¹ This observation is confirmed by the fact that *White Motor Co.*, decided five years before the Supreme Court established a *per se* rule for maximum price fixing, was not mentioned in *Albrecht*. Justice Brennan's statement in *White Motor Co.* that "resale price maintenance . . . invariably . . . reduce[s] price competition"¹²² obviously was directed only at the established, empirical effects of vertical minimum price maintenance.

Professor Posner and other economists have equated the economic effects of minimum retail price restraints and other nonprice vertical restrictions because both can potentially increase nonprice competition and point of sale services by eliminating the "free rider" effect.¹²³ These

119. 433 U.S. at 51 n.18.

120. *Id.*

121. See notes 45-62 and accompanying text *supra*.

122. 372 U.S. at 268.

123. The "free rider" effect is based upon the economic argument that distributors of a manufacturer's product will not provide necessary point of sale services, such as advertising, showrooms, or servicing, for the product in a freely competitive environment because there will always be a few distributors who will not provide such services. The latter distributors will take a "free ride" on the services provided by other distributors. The "free riders" will then be able to charge a lower

two vertical restraints are designed to eliminate intrabrand price competition in the hope of increasing interbrand competition.¹²⁴ This economic reasoning led Justice White in his concurring opinion in *GTE Sylvania* to conclude that "[t]he effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established *per se* rule against price restraints."¹²⁵ It seems evident that footnote eighteen was included to dispel Justice White's fears.¹²⁶ Vertical maximum resale price restraints, however, cannot be compared to minimum resale price restraints or nonprice vertical restrictions, because maximum resale price agreements are not designed to eliminate intrabrand price competition in the hope of increasing interbrand competition.¹²⁷ Thus, the Supreme Court's statement in footnote eighteen that "some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions"¹²⁸ is inapposite to vertical maximum resale price restraints.

Moreover, in the latter portion of footnote eighteen, the Court recognizes that "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing the provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual State."¹²⁹ This further confirms that footnote eighteen was directed only at vertical minimum resale price restrictions. As discussed earlier, the fair trade laws were repealed because of the overwhelming evidence that minimum resale price restraints caused higher prices; there was no evidence introduced in those congressional hearings that maximum resale price agreements also caused higher prices.¹³⁰ In fact, Representative McClory, one of the original sponsors of the Consumer Goods Pricing Act of 1975, stated that the Act was not intended to apply to vertical maximum resale price restraints:

price and thus deprive the providing distributors of the economic benefit of their additional investment in point of sale services. Moreover, consumer satisfaction will be frustrated because consumers cannot get needed point of sale services for their products. See, e.g., Posner, *supra* note 33, at 283-85. The "free rider" effect was recently recognized by the Supreme Court in *GTE Sylvania* as a valid economic justification for nonprice vertical restrictions. 433 U.S. at 55.

124. Economists who support the business need for minimum price restraints based upon the "free rider" effect argue that the manufacturer will set the price at the lowest possible level necessary to provide efficient point of sale services because a lower retail price means increased sales, and therefore, higher manufacturer revenues. See, e.g., Posner, *supra* note 33, at 287-88. In theory, the manufacturer's product is now more competitive in the interbrand market because it is able to provide point of sale services along with the product. But see Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419 (1968).

125. 433 U.S. at 70 (White, J., concurring).

126. "[S]ome commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment." 433 U.S. at 51 n.18.

127. In fact, vertical maximum resale price restraints have no effect on intrabrand price competition.

128. 433 U.S. at 51 n.18.

129. *Id.*

130. See 1975 Senate Fair Trade Hearings, *supra* note 56.

During our hearings on this legislation, we made a concerted effort to investigate all of the legal ramifications of this act. . . . Indeed, it was our feeling after these hearings that the current program of maximum price maintenance is not included within the McGuire Act, and, therefore, no exceptions need be made in this repealer for businesses operating under such a maintenance program.¹³¹

In short, a close examination of footnote eighteen in *GTE Sylvania* reveals that it does not present an obstacle to overruling *Albrecht v. Herald Co.*

V. CONCLUSION

In *GTE Sylvania* the Supreme Court held that commercial business practices should not be proscribed by a per se rule of illegality in section 1 litigation unless empirical economic evidence establishes that such practices have or are likely to have a "pernicious effect on competition"¹³² or that they "lack . . . any redeeming virtue."¹³³ This Article demonstrates that the *Albrecht* per se rule cannot meet the criteria enunciated by the Supreme Court in *GTE Sylvania* and, therefore, that *Albrecht v. Herald Co.* should be overruled. The Supreme Court has never had extensive experience with maximum resale price restraints and this commercial practice has never been proved to have manifestly anticompetitive effects. In fact, this Article demonstrates that the procompetitive effects of maximum resale price restraints far outweigh any alleged anticompetitive effects of maximum resale price restraints.

131. 121 CONG. REC. H23660 (daily ed. July 21, 1975).

132. 433 U.S. at 50 (quoting *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

133. *Id.*